Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 20, 1995

Mr. John Steiner
Division Chief
Opinions, Research and Contracts
Department of Law
City of Austin
P.O. Box 1088
Austin, Texas 78767-1088

OR95-1494

Dear Mr. Steiner:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 32798.

The City of Austin received a request under the Open Records Act for "access to all notes, papers, correspondence, communications, and documents related to any provision of abortion services by the City of Austin and specifically related to the recent City Council resolution to increase funding for abortions (Agenda Item No: 26, Agenda Date December 1, 1994)."[1] As you point out, you sent the letter requesting an attorney general decision on this matter to this office more than ten days after the date of receiving the written request for records. If a governmental body does not request a ruling within the ten-day time period, the information will be presumed to be open to the public, and only the demonstration of a compelling interest will overcome the presumption. *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ). Compelling interests that overcome the presumption include the need to protect the privacy interests of a third party, Open Records Decision No. 71 (1975), and a claim under section 552.110, which protects "[a] trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision," Open Records Decision No. 552 (1990).

[1]The requestor states in his brief that he assumes that the records you have submitted to us include a document probably entitled "Amendment Number One Between The City of Austin and Austin Reproductive Services For Reproductive Health Services," copies of statements of fees per patient, written reports of the city's on-site monitoring of the contracts, and documents that indicate complications to abortions. We did not find such items among the records.

You state that many records have been made available to the requestor, some of which the city would have sought to withhold but for its failure to seek a determination from the Attorney General within ten days of receiving the request. You also raise the privacy, security and liberty interests of third parties, which you believe would prevent the disclosure of security protocols as well as the disclosure of the names of staff members and patients, and you have redacted this information from the records submitted with your request. The requestor has informed us in a brief that he does not want access to these names or the security protocols. Since the request does not reach this information, we need not determine whether the privacy, security, and liberty interests of third parties would protect this information from disclosure. *See generally United States Dep't of State v. Ray*, 112 S.Ct. 541, 548 (1991) (disclosure of individual's name and identifying information would constitute a clearly unwarranted invasion of personal privacy where it would expose the individual to possible retaliation).

You also state that some documents sought by the requestor contain information provided to the city by third parties with the understanding that it is proprietary, such as details about the clinic's insurance, identity of insurance agent, and amount of premiums; and business forms and procedures developed by the clinic.[2] You suggest that some of this information may be protected by 552.101 and 552.110 of the Government Code.

In cases where a third party's property interests may be implicated, section 552.305 relieves the governmental body of its duty under section 552.301(b) to state which exceptions apply to the information and why they apply only if the governmental body requests a ruling from the attorney general, and the third party or another party has submitted reasons for withholding or releasing the information. Pursuant to section 552.305 of the Government Code, you have declined to release the requested information in order to request an open records ruling. By copy of your request letter to us, you have notified the third parties of their opportunity to make this argument, and we also sent them a letter notifying them of this opportunity.

An attorney representing the third parties has submitted a brief claiming that various records are confidential by law. We need not address his arguments about the identity of personnel or patients or about security arrangements, since the requestor does not seek these.

The brief argues that insurance carriers and insurance agents who do business with abortion clinics are potential targets of violence and that their security, liberty, and privacy interests require that their names be withheld pursuant to section 552.101 of the Government Code.[3] The brief does not state why the insurance carrier and agent, who do not work on the clinic premises, are potential targets of the violence that has been directed at clinics. The brief asserts no more than "a generalized and speculative fear

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[2]You also mention detailed security protocols in this list, but the requestor has informed us that he does not want these.

[3]Of the persons on this list, we need only to consider the insurance carriers and insurance agents.

of harassment," which Open Records Decision No. 169 (1977) found to be an insufficient basis for withholding the addresses of public employees pursuant to a common law right of privacy. Thus, the insurance agent's name may not be excepted from disclosure by a common law or constitutional right of privacy.

The right of privacy is moreover designed to protect human beings, rather than to safeguard property, business or other pecuniary interests. *See* Open Records Decision No. 192 (1978). The identity of the insurance carrier may not be withheld under section 552.101 of the Government Code.

The brief for the third parties also claims that certain records constitute trade secrets, or commercial, or financial information protected by section 552.101 and 552.110 of the Government Code. These records include information about contract terms, billing procedures, fees and reimbursement levels, job descriptions, resumes, patient follow-up and referral protocols, insurance coverages and carriers, and medical protocols and infection control procedures. Section 552.110 of the Government Code permits a governmental body to withhold

> [a] trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision . .

"[C]ommercial or financial information obtained from a person and privileged or confidential by statute or judicial decision" may be withheld only if it is also protected by section 552.101 of the Government Code. Open Records Decision No. 592 (1991). The brief submitted on behalf of third parties makes no argument that any commercial or financial information is protected by section 552.101 of the Government Code.

The Texas Supreme Court has adopted the definition of the term "trade secret" from the Restatement of Torts, section 757 (1939), which holds a "trade secret" to be

> any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers.

See Hyde Corp. v. Huffines, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958). The determination of whether any particular information is a trade secret is a determination of fact.[4] Open Records Decision No. 552 (1990) at 2.

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[4]Noting that an exact definition of a trade secret is not possible, the Restatement lists six factors to be considered in determining whether particular information constitutes a trade secret:

> (1) the extent to which the information is known outside of [the company's] business;

This office is unable to resolve disputes of fact regarding the status of information as "trade secrets" and must rely on the facts alleged or discernible from the documents provided for our review. We accept a claim for exception as a trade secret when a prima facie case is made that the information constitutes a trade secret and no argument is made that rebuts that assertion as a matter of law.

The clinic claims trade secret protection for its commercial information for the following reasons stated in its brief:

> [1] [It] is not known outside the Clinic, [2] is disseminated only to officers of the Clinic; [3] is closely guarded in order to maintain secrecy; [4] is extremely valuable to the Clinic; [5] would be of great value to competitors; [6] was developed at great cost to the Clinic; and [7] could not be easily duplicated or acquired by a competitor.

We conclude that the clinic has not made a prima facie case that information about billing procedures, fees and reimbursement levels, job descriptions, resumes, patient follow-up and referral protocols, insurance coverages and carriers, and medical protocols and infection control procedures constitute trade secrets. Its arguments are generalized and it claims "trade secret" protection for items that prior decisions of this office have concluded cannot be trade secrets. Information held by an entity, such as the clinic's fees, cannot be a trade secret if it is disclosed in the goods or services the entity provides. Open Records Decision No. 592 (1991). Resume information does not qualify as secret information that belongs to the employer, because an employee knows the facts of his own employment history and ordinarily will provide this information to future employers or potential employers. Job descriptions are generally disclosed to applicants. The clinic has not shown that any of the items it cites constitute trade secrets.

(Footnote continued)

> (2) the extent to which it is known by employees and others involved in [the company's business];
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> (3) the extent of measures taken by [the company] to guard the secrecy of the information;
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> (4) the value of the information to [the company] and to [its] competitors;
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> (5) the amount of effort or money expended by [the company] in developing the information; [and]
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> (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.
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> RESTATEMENT OF TORTS § 757 cmt. b (1939).

We have reviewed the records you have submitted. Since the requestor does not ask for the names of clinic staff and patients or for security personnel, we approve your redactions of these items. The remaining information must be disclosed.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

Susan L. Garrison

Susan L. Garrison
Assistant Attorney General
Open Government Section

SLG/MRC/rho

Ref.: ID# 32798

Enclosures: Submitted documents

cc: Mr. John Pojman
Executive Director
Greater Austin Right to Life
P.O. Box 49137
Austin, Texas 78765
(w/o enclosures)

Mark J. Hanna, P.C.
900 Congress Avenue, Suite 250
Austin, Texas 78701
(w/o enclosures)

Nova Health Systems
ATTN: Legal Counsel
215 W. Olmos Street
San Antonio, Texas 78212
(w/o enclosures)